

ORIGINAL

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application for)
Transfer of Control of WCS Licenses)
)
from WCS Wireless, Inc., Transferor,)
)
to XM Satellite Radio Holdings, Inc.,)
Transferee.)
)

File No. TC-0002240823

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*Federal Communications Commission
Office of Secretary*

**PETITION TO DENY
OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF
BROADCASTERS**

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August 3, 2005

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Pursuant to 47 C.F.R. §§ 1.939, 1.948(j) and 47 U.S.C. § 309, the National Association of Broadcasters (“NAB”) respectfully petitions the Commission to deny the above-captioned application for transfer of control of WCS licenses from WCS Wireless, Inc. (“WCS Wireless”) to XM Satellite Radio Holdings, Inc. (“XM”) (collectively, “Applicants”). At a minimum, NAB asks the Commission to remove the transfer application from “streamlined” processing so that the Commission and interested parties can obtain enough information about this transfer to properly determine whether it will serve the public interest, convenience and necessity.

NAB is a party in interest to this license transfer application. As the leading trade association that promotes and protects the interests of radio broadcasters, NAB is the broadcaster’s voice before the Commission, Congress, and the courts. On behalf of its radio broadcaster members, NAB has participated in nearly all the Commission’s proceedings addressing broadcast-related issues, including the three major prior proceedings discussed in this petition. NAB’s terrestrial radio broadcasting members stand to be substantially harmed by the

proposed license transfer application if the Commission grants the application, especially without appropriate conditions on XM's use.

INTRODUCTION AND SUMMARY

NAB respectfully urges the Commission to remove XM's application to acquire 16 blocks of Wireless Communications Service ("WCS") spectrum from streamlined consideration. As discussed below, there are significant public policy issues at stake here. Yet because XM has not disclosed its plans for the WCS licenses with specificity, neither the Commission nor interested parties can determine whether or how this transfer would serve the public interest. The Communications Act requires the Commission to give full consideration to XM's application.^{1/} The Commission cannot do so on the record before it.

This matter is inappropriate for streamlined treatment. The proposed transfer of control would contravene the public interest, convenience and necessity and potentially violates the Commission's Rules and Orders. Specifically, the application presents compelling evidence of trafficking violations by WCS Wireless. The application also raises a host of public interest concerns, including whether XM intends to use WCS spectrum in ways that could cause interference to other users and may contravene Commission orders and policies. It presents a number of novel issues that exceed the Wireless Telecommunication Bureau's ("Bureau") delegated authority. All these issues should be investigated thoroughly — this cannot be done in the streamlined process.

If, after appropriate investigation, the Commission considers granting this transfer, it should develop and impose conditions to protect the public interest. Such conditions should

^{1/} 47 U.S.C. §§ 309, 310(d).

include ones to protect the viability of terrestrial broadcasting. In its order authorizing Satellite Digital Audio Radio Service (“SDARS”),^{2/} the Commission authorized XM’s primary service as a national service. And, in doing so, it promised “to monitor and evaluate the potential and actual impact of satellite DARS, particularly in small radio markets, so that [the Commission] will be able to take any necessary action to safeguard the important service that terrestrial radio provides.”^{3/} There is a serious risk that, after the transfer of control is consummated, XM would seek to use these licenses in a way that could jeopardize the public benefits of local terrestrial radio. Accordingly, the Commission should condition any approval here to protect the public interest.

BACKGROUND

The Commission auctioned both SDARS and Wireless Communications Service spectrum in April of 1997. The *WCS Authorization Order* did not earmark WCS spectrum for a specific use because the Commission needed to bring the spectrum to auction within a “short time mandated by Congress,” and the record before the Commission at that time did not provide convincing evidence of which use of the spectrum would best serve the public interest.^{4/} The

^{2/} Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band Report and Order*, 12 FCC Rcd 5754 (1997) (“SDARS Authorization Order” or “SDARS Further Notice”).

^{3/} *Id.* at 5769 ¶ 33.

^{4/} Report and Order, *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”)*, 12 FCC Rcd 10785, 10798 ¶ 27 (1997) (“WCS Authorization Order”).

Commission therefore allowed a range of potential uses for WCS spectrum, but required WCS applicants to designate “the type(s) of WCS service(s) they will provide” if granted the license.^{5/}

The Commission also stressed that WCS was not without limits. The Commission recognized Congress’ direction that the spectrum should be licensed in way that would “‘promote the most efficient use of the spectrum’ and ‘take into account the needs of public safety radio services.’”^{6/} Certain uses were prohibited — specifically, satellite services would be limited to “audio broadcast[s]” as required by the international allocation of the band.^{7/} Other prohibited services included “fixed-satellite service, terrestrial broadcasting services (other than ‘compl[e]mentary terrestrial broadcasting service’ in support of satellite DARS operations), and mobile-satellite service.”^{8/} Similarly, licensees using WCS spectrum for DARS services would “be governed by the rules and regulations that will apply to the exclusive DARS spectrum between 2320-2345 MHz.”^{9/} Thus, if WCS spectrum were used for SDARS service, the SDARS regulatory framework would apply, including the limitation that supporting terrestrial services be “complementary.”

^{5/} *Id.* at 10788 ¶ 7.

^{6/} *Id.* at 10789 ¶ 10 (quoting Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, 110 Stat. 3009, §§ 3001(a), (b) (1996)).

^{7/} *Id.* at 10800 ¶ 30.

^{8/} *Id.* n.70.

^{9/} *Id.* at 10860 ¶ 150; *see also id.* at 10788 ¶ 7 (“WCS licensees that provide satellite Digital Audio Radio Service (‘satellite DARS’) services will be governed by the rules to be adopted in IP Docket No. 95-91.”).

When the Commission developed its regulatory framework for SDARS (concurrently with WCS), it recognized the “significant public value of terrestrial radio service”^{10/} and focused on SDARS’ “impact on the provision of locally originated service.”^{11/} The Commission was persuaded to allow SDARS because it was a “national service” and, therefore, “the effect of satellite DARS on terrestrial radio is likely to be significantly smaller than the effect of additional terrestrial radio stations.”^{12/} The Commission emphasized that it remained “committed to supporting a vibrant and vital terrestrial radio service for the public.”^{13/}

The Commission has subsequently accommodated the interests of satellite radio while also preserving the important public benefits of local terrestrial broadcasting. In September 2001, the Commission granted XM’s request for special temporary authority to operate terrestrial repeaters for its satellite signal, with the condition that “the use of repeaters is restricted to the simultaneous retransmission of programming, in its entirety, transmitted by satellite directly to SDARS subscriber’s receivers.”^{14/} The Commission made clear that it had “conditioned this STA to address” the concerns expressed by commenters^{15/} — namely, that conditions were

^{10/} *SDARS Authorization Order* at 5759 ¶ 9.

^{11/} *Id.* at 5767 ¶ 29; *see id.* at 5763-69 ¶¶ 18-34.

^{12/} *Id.* at 5763 ¶ 18.

^{13/} *Id.* at 5769 ¶ 33.

^{14/} Order and Authorization, *XM Radio Inc. Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeater*s, 16 FCC Rcd 16871, 16784-85 ¶ 11 (2001) (“*SDARS Repeaters STA*”).

^{15/} *Id.* at 16784 ¶ 9.

needed to “adequately prohibit local origination of programming” and “ensure that the DARS licensees do not provide local service.”^{16/}

Given the significant policy issues the Commission has recognized exist with SDARS and WCS services, the Commission cannot properly act to grant these applications in a streamlined process.

ARGUMENT

I. THE COMMISSION SHOULD DENY THIS APPLICATION OR, AT A MINIMUM, REMOVE THE APPLICATION FROM STREAMLINED CONSIDERATION AND REQUIRE MORE INFORMATION.

The Commission cannot approve this application on the current record. As a threshold matter, the evidence here suggests that WCS Wireless may be violating the Commission’s anti-trafficking rules. The Applicants also have failed to satisfy their burden of showing that the proposed transaction would serve the public interest, convenience and necessity. At a minimum, the Commission should remove the application from the streamlined process and require XM and WCS to provide substantially more information about both the trafficking and public interest issues. This application is inappropriate for streamlining because it presents a number of important public policy concerns, which will require additional time and full Commission involvement for adequate consideration.

A. WCS Wireless Appears to Be Engaged in Trafficking.

WCS Wireless appears to be violating the Commission’s anti-trafficking rules. Those rules prohibit a party from “obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of

^{16/} *Id.* ¶ 10.

telecommunication services to the public or for the licensee's own private use."^{17/} Parties are not required to develop a telecommunications service fully to survive a trafficking challenge, and they are not prohibited from making money on a transaction. But the Commission's rules do prohibit obtaining a license authorization for the purpose of speculation.

It seems apparent that WCS Wireless acquired these licenses only to sell them. Rank speculation is the only thing that can explain WCS Wireless's actions on the current record. WCS Wireless has held eight of its licenses — representing half of the proposed transaction — *for only four months*.^{18/} WCS Wireless bought these licenses from VoiceStream in March 2005,^{19/} and it bought the other eight licenses out of a bankruptcy in 2003.^{20/} WCS Wireless does not appear to have engaged in *any* development of any of these licenses. WCS Wireless has no website or other paper trail that would indicate that it is a real telecommunications company. To the contrary, "WCS Wireless [LLC] was formed to acquire and hold spectrum licenses in the WCS band,"^{21/} according to Columbia Capital Equity Partners, an investment fund that owns about half of WCS Wireless.^{22/} That XM may have no intentions of trafficking is of no

^{17/} 47 C.F.R. § 1.948(i).

^{18/} These include KNLB208, KNLB302, KNLB303, KNLB304, KNLB305, KNLB306, KNLB307, and KNLB308. *See* Application for Assignments of Authorization and Transfers of Control (Form 603), File No. 0002064363 (submitted Mar. 2, 2005).

^{19/} *Id.*

^{20/} These include KNLB207, KNLB295, KNLB296, KNLB297, KNLB298, KNLB299, KNLB300, and KNLB301. *See* Application for Assignments of Authorization and Transfers of Control (Form 603), File No. 0001512230 (submitted Dec. 3, 2003).

^{21/} *See* http://www.colcap.com/portfolio/communications_service.html (last visited August 2, 2005).

^{22/} *See* WCS Wireless License Subsidiary LLC, Ownership Disclosure Filing (Form 602), File No. 0002080061 at Ex. A (submitted Nov. 26, 2003).

consequence. WCS Wireless' sale is also part of this transaction (and that sale is essential for the speculation), and the rules expressly apply to the transferor (here WCS Wireless).^{23/}

The Commission may deny an application "if the transaction is for purposes of trafficking in service authorizations."^{24/} These facts present ample grounds to do so. At a minimum, the Commission should remove this proceeding from its streamlined procedures and require WCS Wireless to provide affidavits, as the Commission's rules prescribe, to disprove that it is engaged in trafficking violations.^{25/} Even then, it seems doubtful WCS Wireless could rebut a trafficking case on these facts. The two examples given in the rules include "a demonstration that the proposed assignment is due to changed circumstances (described in detail) affecting the licensee after the grant of the authorization, or that the proposed assignment is incidental to a sale of other facilities or a merger of interests."^{26/} XM is buying nothing but a shell company formed to hold naked licenses, and it is difficult to imagine what has changed in the past four months, especially given Columbia Capital Equity Partners' admission that WCS Wireless LLC's purpose was simply to acquire licenses.

B. The Commission Cannot Grant the Application Under Streamlined Consideration Because the Applicants Have Not Carried Their Burden of Proof on the Current Record.

The Commission also cannot approve the expedited application because the Applicants have not provided enough information to carry their burden of proof. Under Section 310(d) of

^{23/} 47 C.F.R. § 1.948(i)(2).

^{24/} *Id.* § 1.948(i). See also Order, *Thomas K. Kurian, et. al.*, 18 FCC Rcd 21949, 21952 ¶ 11 (2003).

^{25/} 47 C.F.R. § 1.948(i)(2).

^{26/} *Id.*

the Communications Act, a license may be transferred only upon a finding by the Commission that the proposed transfer will serve “the public interest, convenience, and necessity.”^{27/} The Commission has made clear that “[t]he Applicants bear the burden of proving by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.”^{28/} Because the Applicants have not done so, the Commission may not grant the application. At a minimum, the agency must remove it from streamlined consideration and require the Applicants to submit a sufficient public interest statement.

Applicants must provide significant information because the Commission must engage in a thorough analysis of the impact of the transaction. The Commission has explained that “[t]he public interest standard involves the balancing of potential public interest harms of the proposed transaction against the potential public interest benefits.”^{29/} The public interest analysis “considers the likely competitive effects of the proposed transaction and whether such assignments raise significant anti-competitive concerns.”^{30/} The “potential public interest harms”

^{27/} 47 U.S.C. § 310(d).

^{28/} Memorandum Opinion and Order, *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-In-Possession, and NextWave Power Partners, Inc., Debtor-In Possession, to Subsidiaries of Cingular Wireless LLC*, 19 FCC Rcd 2570, 2580-81 ¶ 24 (2004) (citing Memorandum Opinion and Order, *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd 473, 483 ¶ 15 (2004), Hearing Designation Order, *Application of EchoStar Communications Corporation, et. al., and EchoStar Communications Corporation (Transferee)*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002), Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, 17 FCC Rcd 23246, 23255 ¶ 26 (2002)).

^{29/} *Id.*

^{30/} *Id.*

and “anti-competitive concerns” are particularly salient in this case. In the two orders that effectively authorize XM’s business, the Commission recognized the “significant public value of terrestrial radio service”^{31/} and took steps to reconcile XM’s proposed activities with these important interests.

The Applicants also bear the burden of determining whether “additional information is necessary under Section 310(d) in light of the circumstances of the particular transaction.”^{32/} Applications in certain circumstances should include additional materials explaining “the factual circumstances and describing how the proposed transaction meets the public interest standard of Section 310(d).”^{33/} These circumstances include when “1) the application involves a non-pro forma assignment or transfer of a license in a subscriber-based service, and 2) the proposed assignee or transferee [is] authorized to provide FCC-regulated subscriber-based services in a geographic area that overlaps the service area of a license that is the subject of the proposed assignment or transfer.”^{34/} This is the case here.

XM has not satisfied its burden. The application merely states that the transfers would give XM “access to the WCS spectrum,” with which “XM will be able to accelerate the effort begun by WCS Wireless, Inc. to develop a system on the WCS frequencies that will be capable of providing a wide range of new and innovative mobile multimedia subscription services similar to those under development in the 700 MHz band (Qualcomm) and the 1670-1675 MHz band

^{31/} See, e.g., *SDARS Authorization Order* at 5759 ¶ 9.

^{32/} Form 603 Instructions, Item 6 Note.

^{33/} *Id.*

^{34/} *Id.*

(Crown Castle).”^{35/} Such a statement improperly seeks to shift the burden to the Commission to investigate what these other companies are doing with their spectrum — spectrum that is not in this band. Moreover, everyone is left to guess whether XM will actually develop these services, or whether it intends to develop any *other* services. Without adequate information, the Commission cannot conclude that the proposed transaction is in the public interest.

In short, XM should be required to provide more complete information regarding its proposed use of the WCS licenses. As the Court of Appeals has stated, “the Commission is not expected to ‘play procedural games with those who come before it in order to ascertain the truth.’”^{36/} Licensees “have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.”^{37/} If XM does not provide truthful and complete information regarding its proposed use of the spectrum, its application cannot be granted.

C. XM’s Acquisition of the WCS Licenses Presents Policy Issues That Are Inappropriate for Expedited Consideration and Likely Exceed the Bureau’s Delegated Authority.

The application poses policy issues that are not appropriate for action on Bureau level delegated authority. The Commission has made clear that applications should be “removed from [streamlined] processing” where, as here, there is a “need for further investigation or

^{35/} WCS Wireless’s and XM’s Application (Form 603), Ex. 2 (Public Interest Statement).

^{36/} *RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) (quoting FCC Brief at 60).

^{37/} *Id.* at 232.

consideration . . . for raising potential public interest concerns identified by the Commission or in petitions to deny.”^{38/}

The application presents a number of “potential public interest concerns.” First, XM’s application complicates — and could inappropriately pre-judge — existing policy issues concerning SDARS repeaters and their impact on other WCS license holders. In the ongoing SDARS rulemaking, the Commission has wrestled with WCS interference issues for eight years. XM’s high-power repeaters — which might be employed to transmit WCS signals as well — have been a major source of that interference. The uncertainties created by XM’s proposed transaction further complicate efforts to resolve those ongoing rulemaking issues, as a coalition of other WCS license holders just announced.^{39/} The multi-year effort behind the repeater rulemaking, moreover, belies any notion that XM’s application is appropriate for resolution on fast-track procedures.

Second, XM’s application suggests that it may use the WCS licenses to provide localized audio and other services bundled with its SDARS service that would differ from market to market. Yet the Commission has acknowledged that localized audio transmissions threaten to undermine the health of terrestrial broadcasting and the essential services that local radio stations provide. In the SDARS repeaters proceeding, XM repeatedly represented that it would not

^{38/} Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 19 FCC Rcd 17503, 17554 ¶ 101 n.266 (2004).

^{39/} *XM Buys WCS Wireless, Complicating FCC’s Repeater Rulemaking*, Communications Daily (July 15, 2005). Indeed, this transaction doubly complicates those issues because WCS Wireless has filed an application, which XM has asked to adopt, asking for a waiver of some of the applicable power limits. WCS Wireless’s and XM’s Application (Form 603), Ex. 1, n.1 (Description of Transaction).

provide localized services,^{40/} and the Commission's orders reflected the national nature of XM's proposed service.^{41/} The possibility that XM will turn away from these commitments and the Commission's orders and policies raises more than ample public interest concerns to require that this application receive careful consideration.

Third, and as a result, XM's acquisition of WCS spectrum could have a significantly negative impact on traditional broadcast of local content. The potential increased economic impact on terrestrial broadcasting calls into question the Commission's original assumptions in authorizing SDARS and, hence, the results of that rulemaking. This change in circumstances is at least relevant in evaluating XM's application. It may also necessitate re-opening the original SDARS authorization to conduct the investigation promised in that order.⁴²

In light of these public interest concerns, it is clear that any approval of XM's application should include appropriate conditions. Imposing conditions on the proposed license transfer, in turn, would require participation from interested parties as well as sufficient consideration from the Commission. An appropriate proceeding would formulate the exact terms of transfer conditions and determine whether restrictions were appropriate for all WCS licenses or only, as in XM's case, WCS licenses that will be used in conjunction with SDARS services.

^{40/} For example, XM told the Commission that it "has consistently reasserted its intention that the repeaters will only simultaneously rebroadcast the programming from its satellites." Reply Comments of XM Radio, Inc., IB Docket No. 95-91 (Aug. 31, 2001) at 3.

^{41/} The Commission imposed conditions to "adequately prohibit local origination of programming" and "ensure that the DARS licensees do not provide local service." *SDARS Repeaters STA* at 16784 ¶ 10; *see id.* at 16784-85 ¶¶ 9, 11 (noting the conditions it imposed would address these concerns).

⁴² *SDARS Authorization Order* at 5769 ¶ 33.

Under the Commission's rules, the Bureau has "no[] . . . authority to act on any complaints, petitions or requests" that present "new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines."^{43/} Similarly, the Bureau cannot act on rulemaking orders "except such orders involving ministerial conforming amendments to rule parts."^{44/} Because this application implicates policies approved in the full Commission's prior rulemakings, the Bureau is not authorized to approve any transaction that could contravene those policies — only the Commission can decide to depart from the considerations it found compelling at the time of the SDARS rulemaking. Action on this application therefore almost certainly would exceed the Bureau's delegated authority. In addition, XM's likely combination of WCS services with SDARS services to market a single integrated service to consumers would certainly present "new or novel questions of law or policy." And, if the Commission decides to impose general restrictions on all WCS licenses, it will need to do so in a rulemaking. XM's use of neighboring spectrum to circumvent established commitments and policy would also contravene established Commission policy. In short, reasoned consideration of these issues is impossible under the streamlined timelines and procedures.

II. TO ENSURE THE TRANSFER IS IN THE PUBLIC INTEREST, THE COMMISSION SHOULD IMPOSE CONDITIONS ON ANY APPROVAL.

As noted above, the current record does not provide a basis for grant of the application to transfer the WCS licenses. But even if the Commission were considering a grant (after appropriate non-streamlined consideration), the Commission should formulate and impose

^{43/} 47 C.F.R. § 0.331(a)(2).

^{44/} *Id.*, § 0.331(d).

appropriate conditions to ensure this transaction serves the public interest. Only by conditioning any authorization can the Commission make good on its promise to “safeguard the important service that terrestrial radio provides,”^{45/} ensure that XM does not violate prior Commission orders, and safeguard the integrity of the Commission’s proceedings.

A. This Proceeding Presents The Need To Take Additional Action To Safeguard The Public’s Interest in Terrestrial Radio, As the Commission Predicted in 1997.

When it authorized SDARS in 1997, the Commission “emphasize[d] that [it] remain[ed] committed to supporting a vibrant and vital terrestrial radio service for the public.”^{46/} To protect that important interest, especially in light of the “uncertainty inherent in any attempt to predict the impact of satellite DARS on the terrestrial radio industry,” the Commission acknowledged that it may need to take additional actions in the future.^{47/} “The technologies, structure, and regulation of the communications industry are changing dramatically,” the Commission explained, and “[d]evelopments in the next decade may significantly change the market for both satellite DARS and terrestrial broadcasting.”^{48/} The Commission found further that it “could not entirely rule out” a “dramatic adverse impact on terrestrial broadcasting.”^{49/} Accordingly, it promised to “monitor and evaluate the potential and actual impact of satellite DARS,” and to “take any necessary action to safeguard the important service that terrestrial radio provides.”^{50/}

^{45/} *SDARS Authorization Order* at 5769 ¶ 33.

^{46/} *Id.*

^{47/} *Id.*

^{48/} *Id.*

^{49/} *Id.*

^{50/} *Id.*

That day has arrived. XM's acquisition of the WCS licenses presents just the uncertainty, technological shift and market change that the Commission presciently predicted might negatively impact "a vibrant and vital terrestrial radio service for the public."^{51/} It is impossible to know at this point exactly what XM plans to do with this additional spectrum. But the little information XM has provided — and its efforts to date to provide localized services — suggest that it plans to provide localized services in conjunction with its SDARS service in a manner likely to harm terrestrial radio. This transaction therefore requires the Commission to satisfy its commitment to "take necessary action" — in this case, formulating and imposing conditions on any authorization — to safeguard these interests.

B. Conditions Are Essential To Ensure That XM Does Not Violate the Commission's Orders and Policies of Safeguarding Terrestrial Radio.

The Commission should impose conditions to ensure that XM does not violate the Commission's orders and policies. Conditions are essential because of XM's history, its recent public positions, and the evolving uses of WCS spectrum. For example, in a recent letter to Congress, XM contended that the WCS licenses were free of limitations that apply to its use of the SDARS spectrum.^{52/} This statement is incorrect, as explained below, and suggests that XM intends to contravene current restrictions. The Commission should therefore take XM's application off the fast track and resolve these issues before consenting to the transfer.^{53/}

^{51/} *Id.*

^{52/} Letter from Hugh Panero and Gary Parson, XM, to U.S. House of Representatives (July 27, 2005).

^{53/} The Commission cannot rely on working these issues out after the transfer because, among other reasons, XM has taken the position that the Commission cannot impose license restrictions without a hearing and a license modification under Section 316. Opposition of Sirius

Contrary to its assertions, XM could not use the WCS licenses to provide localized programming without violating the Commission's orders and policies. To begin with, providing localized audio service with the WCS licenses *via satellite* would violate the SDARS orders. In particular, XM would contravene the *SDARS Repeater STA* if it used its repeaters to provide audio from satellites on a localized basis even if all the information were transmitted by satellite. The *WCS Authorization Order* provides that "[u]se of the WCS Spectrum for DARS services will be governed by the rules and regulations that will apply to the exclusive DARS spectrum."^{54/} When the Commission (temporarily) authorized XM's use of repeaters to solve signal interference problems in urban areas, it ruled that repeaters may not be used to provide localized content.^{55/} Although repeaters are authorized only to repeat satellite signals in order to remedy urban interference, XM has built a vast repeater network throughout the United States. This aggressive roll-out suggests that XM has additional plans in mind for its repeaters — broadcasting information that would vary from place to place — and its stated position is that by using the WCS spectrum it would be free from any restrictions on such services. But this use of the repeaters has been prohibited both for the SDARS and WCS bands. Under the STA, "the use of repeaters is restricted to the simultaneous retransmission of programming, in its entirety, transmitted by satellite directly to SDARS subscriber's receivers."^{56/}

Satellite Radio Inc. and XM Radio Inc., MB Docket No. 04-160 (filed June 4, 2004) at 15-16 (discussing 47 U.S.C. § 316).

^{54/} *WCS Authorization Order* at 10859-60 ¶ 150; *see also id.* at 10788 ¶ 7 ("WCS licensees that provide [SDARS] services will be governed by the rules to be adopted in IB Docket No. 95-91.").

^{55/} *SDARS Repeater STA* at 16784 ¶ 11.

^{56/} *Id.*

In addition, XM's use of the WCS licenses to provide localized audio programming *through terrestrial signals* would violate the *WCS Authorization Order*. The *WCS Authorization Order* prohibits the use of WCS spectrum to provide "terrestrial broadcasting services (other than 'complimentary terrestrial broadcasting service')." ^{57/} "Complementary terrestrial broadcasting services" are limited to those services that do no more than repeat an entire satellite signal. ^{58/} Therefore, if XM provides audio service through terrestrial signals independent of its satellite network, XM would violate this restriction.

Finally, allowing XM to transmit localized audio or SDARS-integrated content would be inconsistent with established Commission policy. XM's use of the WCS spectrum poses the same policy concerns over adverse impacts on terrestrial broadcasting as its use of SDARS spectrum and repeaters. This is true if XM either (i) offers localized audio programming that would compete with a local radio service, or (ii) bundles any other localized programming with its SDARS service so that the combined package competes with local radio service. This is also true regardless of the technical nature of XM's transmissions. If the transmissions are point-to-point, but integrated with a SDARS audio broadcast, they still function effectively as localized radio broadcasts. These services should therefore be subject to the same conditions as SDARS. Especially given the cursory evaluation the Commission initially was forced to give WCS, the

^{57/} *WCS Authorization Order* at 10800 ¶ 30 n.70.

^{58/} *SDARS Further Notice*, 12 FCC Rcd 5754, 5811 ¶ 139 (proposing "to prohibit the operation of terrestrial gap-fillers except in conjunction with an operating satellite DARS system to ensure its complementary nature and so that there would be no transformation of satellite DARS into an independent terrestrial DARS network"). *Id.* at 5811 ¶ 140 ("CD Radio and DSBC maintain that terrestrial gap-fillers will only be complementary to the satellite DARS systems because they will operate on the same frequency as the satellite transmission *and only retransmit the signals of operating satellite DARS space stations to improve service link margin in difficult propagation environments*, especially in urban areas.") (emphasis added).

Commission should not permit a use of WCS that flies in the face of its SDARS-related policy determinations without adequate consideration and explanation.^{59/} At a minimum, placing the WCS licenses in XM's hands raises substantial policy issues not present for operators lacking an SDARS service. These policy issues, and the exact contours of appropriate conditions, can be sorted out through an appropriate, non-expedited proceeding.

CONCLUSION

For the foregoing reasons, NAB respectfully urges the Commission to remove XM's application from streamlined consideration, require XM to provide adequate information, and impose appropriate conditions on any transfer after sufficient consideration.

Dated: August 3, 2005

Respectfully submitted,



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^{59/} The Commission must provide "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *see also Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 46-57 (1983). For example, in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), the Court remanded as arbitrary and capricious the Commission's decision to retain a rule it had previously determined to eliminate. "So long as the reasoning of the [prior] Report stands un rebutted," the Court held, "the Commission has not fulfilled its obligation, upon changing its mind, to give a reasoned account of its decision." 280 F.3d at 1045.

DECLARATION OF MARSHA J. MACBRIDE

1. I am the Executive Vice President for Legal and Regulatory Affairs of the National Association of Broadcasters ("NAB").
2. I have read the foregoing Petition to Deny the application for transfer of control of licenses from WCS Wireless, Inc. to XM Satellite Radio Holdings, Inc.
3. I have personal knowledge of the facts stated therein sufficient to demonstrate that NAB is a party in interest and sufficient to demonstrate that the grant of the application would be prima facie inconsistent with the public interest.
4. The facts as set forth in the Petition, other than those of which official notice may be taken, are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.



Marsha J. MacBride

Executed on August 3, 2005.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2005, copies of the foregoing Petition to Deny of the National Association of Broadcasters, File No. TC-0002240823, were served upon the following parties:

By hand delivery:

Catherine W. Seidel
Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
236 Massachusetts Avenue, NE, Suite 110
Washington, DC 20002

By e-mail, fax and U.S. mail:

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Scott Donohue
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Jerianne Timmerman